No. 95-1694

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED APRIL 17, 1996
CERTIORARI GRANTED JUNE 17, 1996

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RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16792

Doe v. University of California, et al.

Date	Description
9/29/93	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.
1/10/94	Filed original and 15 copies Appellant John Doe opening brief (Informal: n) 23 pages and five excerpts of record in 1 volume; served on 1/8/94
2/4/94	Filed original and 15 copies appellee University of Calif.'s 30 pages brief, 1 Exc. vols; served on 2/4/94
2/15/94	Filed original and 15 copies John Doe reply brief (Informal: n) 6 pages; served on 2/15/94
11/7/94	Received Richard Gayer for Appellant John Doe letter dated 11/4/94 re: he is fearful that the long delay of calendaring will hurt his client's employment chances. (CALENDAR)
2/15/95	Filed John Doe additional citations, served on 2/14/95 (PANEL)
3/15/95	ARGUED AND SUBMITTED TO Herbert Y. CHOY, William C. CANBY & Thomas G. NELSON; CJJ.

9/11/95	FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Herbert Y. CHOY, author; William C. CANBY, dissenting; Thomas G. NELSON.) FILED AND ENTERED JUDGMENT.
9/25/95	Filed original and 40 copies Appellee University of Calif. petition for rehearing with suggestion for rehearing en banc 14 pages, served on 9/25/95 (PANEL & ALL ACTIVE JUDGES)
10/4/95	Filed order (Herbert Y. CHOY, William C. CANBY, Thomas G. NELSON): Aplts shall file a response to P/R en banc & request to take judicial notice of "Campus financial schedules 1991-1992", which is attached to the P/R.
10/25/95	Filed Appellant John Doe's response to petition for enbanc rehearing [2868359-1] served on 10/25/95. (PANEL & ALL ACTIVE JUDGES)
1/19/96	Filed order (Herbert Y. CHOY, William C. CANBY, Thomas G. NELSON): There having been no objection made by aplts to the request made by aples that this court take judicial notice of certain excerpts from the publication entitled "The University of California Campus Financial Schedules 1991-1992", that request is hereby granted. A majority of the panel has voted to deny aple's P/R and to reject the suggestion for rehearing en banc. Judge Canby has voted to grant the petition and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. The P/R is denied and the suggestion for rehearing en banc is rejected.

1/26/96	Filed University of Calif. motion to stay the mandate pending petition for writ of certiorari, served on 1/26/96 (CHOY by fax)
1/31/96	Filed order (Herbert Y. CHOY): Appellee's motion to stay the mandate pending petition to the U.S. Supreme Court for a writ of certiorari is granted.
6/21/96	Rec'd letter from the Supreme Court dated 6/17/96 re: order file granting American Council on Education, et al. leave to file brief amicus curiae. The petition for writ of certiorari is granted.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

No. 92-CV-2284

Doe v. Lawrence Livermore, et al.

Date	No.	Description
6/18/92	1	COMPLAINT (Summons(es) issued)
9/14/92	5	ANSWER by defendant Lawrence Livermore, defendant John Nuckolls, defendant University of Calif., defendant David Gardner to complaint [1-1]
9/25/92	7	MOTION by plaintiff John Doe for leave to file first amended complaint with Notice set for 10/29/92 @ 2:15 PM
10/20/92	11	STIPULATION and ORDER by Judge Stanley A.Weigel : for leave to file a first amended complaint, extending time to answer first amended complaint to 11/18/92
10/22/92	13	FIRST AMENDED COMPLAINT [1-1] by plaintiff John Doe
10/27/92	15	MOTION by federal defendants for protective order staying all discovering pending submission and resolution of Federal Defendants' dispositive motion with Notice set for 12/10/92
11/25/92	22	STIPULATION of dismissal of federal defendants

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12/9/92	23	MOTION by defendant to dismiss before Judge Stanley A. Weigel with Notice set for 1/14/93 @ 2:15
12/9/92	24	MEMORANDUM by defendant in support of motion to dismiss before Judge Stanley A. Weigel
12/24/92	25	MEMORANDUM by plaintiff John Doe in opposition to motion to dismiss before Judge Stanley A. Weigel [23-1]
12/24/92	26	DECLARATION by Richard Gayer on behalf of plaintiff re opposition memorandum [25-1]
1/8/93	28	REPLY by defendant to response to motion to dismiss before Judge Stanley A. Weigel [23-1]
2/5/93	29	MEMORANDUM, OPINION AND ORDER: by Judge Stanley A. Weigel All plaintiff's causes of action against defendant Gardner are dismissed; plaintiff's breach of contract cause of action against defendant Nuckolls is dismissed; plaintiff's section 1983 cause of action against defendant Nuckolls in his official capacity is dismissed; plaintiff's section 1983 cause of action against defendants UC, Lab, Groseclos, Perret, and Perko is dismissed.

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2/22/93	32	MEMORANDUM by plaintiff in support of motion for reconsider on motion to dismiss [31-1], of motion for leave to file second amended complaint [31-2]
3/11/93	33	OPPOSITION by defendants to motion for reconsider on motion to dismiss [31-1], motion for leave to file second amended complaint [31-2]
3/17/93	34	REPLY by plaintiff John Doe to response to motion for reconsider on motion to dismiss [31-1], motion for leave to file second amended complaint [31-2]
3/25/93	36	MEMORANDUM, OPINION, AND ORDER: by Judge Stanley A. Weigel denying motion for reconsider on motion to dismiss [31-1], granting motion for leave to file second amended complaint [31-2]
4/7/93	37	SECOND AMENDED COMPLAINT [13-1] by plaintiff John Doe terminating defendant David Gardner
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6/17/93	43	REPLY by University of CA, John Nuckolls, Lawrence Livermore to response to motion to dismiss second amended complaint [40-1]
6/24/93	45	MEMORANDUM, OPINION, AND ORDER: by Judge Stanley A. Weigel granting motion to dismiss some claims in the second amended complaint [40-1]
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8/3/93	52	BRIEF FILED by plaintiff John Doe regarding motion to stay [50-1], regarding motion to certification to appeal under Rule 54b [50-2]
8/13/93	53	OPPOSITION by defendant to motion to stay [50-1], motion to certification to appeal under Rule 54b [50-2]

8/24/93	54	REPLY by plaintiff John Doe re motion to stay [50-1], re motion to certification to appeal under Rule 54b [50-2]
9/2/93	56	MEMORANDUM and ORDER by Judge Stanley A. Weigel: plaintiff's claim for breach of contract is dismissed; this action stayed pending decision by Ninth Circuit; plaintiff Doe is to report to the Court the status of the appeal, commencing in 90 days and every 30 days thereafter. dismissing case
9/13/93	57	JUDGMENT: by Judge Stanley A. Weigel, in accordance with the 9/2/93 memorandum and order, it is adjudged that plaintiff's claims for breach of contract are dismissed.
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10/27/93	62	JUDGMENT: by Judge Stanley A. Weigel dismissing case with prejudice

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DR JOHN DOE, PHD., and all others similarly situated

Plaintiffs-Appellants,

vs

LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, Director,

Defendants

and

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants-Appellee

C 92-2284 SAW

Filed September 11, 1995

JUDGES Before: Herbert Y. C. Choy, William C. Canby, Jr. and Thomas G. Nelson, Circuit Judges. Opinion by Judge Choy; Dissent by Judge Canby.

CHOY, Circuit Judge:

Appellant, Dr. John Doe, Ph.D. ("Doe"), on behalf of himself and all others similarly situated, appeals the district court's dismissal of his breach of contract claim against the Regents of the University of California ("University") and his § 1983 claim against John Nuckolls ("Nuckolls"), director of the Lawrence Livermore National Laboratory ("Laboratory") which is owned by the United States Department of Energy ("Department") and is operated by the University.

Doe is a mathematical physicist who signed an employment contract with the Laboratory. Doe contends that the Laboratory wrongfully refused to perform the contract of employment by peremptorily determining that Doe could not obtain a security clearance from the Department. The district court dismissed Doe's breach of contract claim against the Laboratory and the University because it held that the Laboratory and the University, as arms of the state, were immune from suit in federal court under the Eleventh Amendment. Doe appeals the district court's decision to grant Eleventh Amendment immunity to the University, as manager of the Laboratory.

Doe also appeals the district court's dismissal of his *42 U.S.C. § 1983* claim against Nuckolls, in his official capacity, and seeks reconsideration of his application for employment at the Laboratory without reference to security clearance matters. The district court dismissed the § 1983 claim because it determined that Nuckolls was not a "person" under § 1983 and thus was not liable for Doe's claim which sought relief solely for a violation alleged to have occurred in the past.

Having jurisdiction under *28 U.S.C. § 1291*, we reverse the district court's dismissal of Doe's breach of contract claim. We hold that the Eleventh Amendment does not immunize the University from suit in federal court because the University is not an "arm of the state" in this specific instance. We also reverse the dismissal of Doe's § 1983 claim against Nuckolls, in his official capacity, because Nuckolls is a "person" under § 1983 and is liable to suit for retrospective relief. We need not address the

issue of whether reconsideration of Doe's employment constitutes prospective injunctive relief but remand to the district court for further proceedings in accordance with our holding.

I

Doe is a mathematical physicist who received his Ph.D. from Harvard University in 1981. The Laboratory is a facility operated by the University under contract with the Department. Although the University controls all employment matters at the Laboratory, the Department exclusively handles security clearances for Laboratory employees.

Doe allegedly accepted the Laboratory's written offer of employment as a physicist in mid-June, 1991. The employment offer included a salary of $6,100 per month and required Doe to obtain a "Q" security clearance from the Department in a reasonable period of time after he became an employee of the Laboratory. Doe alleges that shortly after he accepted the employment offer, the Laboratory attempted to withdraw the offer, claiming that Doe could not obtain the required security clearance from the Department.

The contract between the United States of America ("Government") and the University for the management and operation of the Laboratory specifies that the Department, rather than the University, will pay the costs of any judgment rendered against the University in performing the contract, including all costs involved in litigation. Modification No. M205, Supplemental Agreement to Contract No. W-7405-ENG-48 ("Contract").

On June 18, 1992, Doe filed his initial complaint against the University, its president, David Gardner ("Gardner"), the

Laboratory, and its director, Nuckolls.[1] The complaint contained a claim for breach of employment contract against the Laboratory, the University, Gardner, and Nuckolls. In addition, the complaint contained a § 1983 claim against the Laboratory, the University, and Nuckolls and Gardner, in their official capacities, alleging deprivation of due process of law because unqualified personnel at the Laboratory peremptorily determined eligibility for a "Q" security clearance in violation of federal security clearance regulations. Finally, the complaint contained a claim for failure to enforce security regulations. On October 22, 1992, Doe amended his complaint to add allegations suing Nuckolls and three additional employees of the University, all in their individual capacities, for violation of § 1983.

On December 9, 1992, the defendants moved to dismiss Doe's § 1983 claim on the ground that the University and the Laboratory, as arms of the State, and Gardner and Nuckolls, in their official capacities, are not "persons" within the meaning of § 1983. In addition, the defendants sought to dismiss the three newly-added University employees and Nuckolls, in his individual capacity, on the ground that the statute of limitation period had run. Finally, Gardner and Nuckolls moved to dismiss Doe's breach of contract claim on the ground that neither was alleged to be party to the employment contract.

On February 5, 1993, the district court dismissed all claims against Gardner, the breach of contract claim against Nuckolls, and the § 1983 claim against the University, the Laboratory, the three University employees, and Nuckolls, in his official capacity. In its order, however, the district court noted that a plaintiff may assert a § 1983 claim against a state official, acting in her official capacity, if the plaintiff seeks prospective injunctive relief. Doe's

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[1] The Department, James Watkins (Secretary of Energy), and Richard Claytor (Assistant Secretary of Energy for Defense Programs) were also listed as defendants but were later dismissed with prejudice by stipulation on November 25, 1992.

breach of contract claim against the University and the Laboratory, and his § 1983 claim against Nuckolls, in his individual capacity, survived.

On April 7, 1993, Doe filed a second amended complaint which contained two claims. The first claim, against the Laboratory and the University, alleged breach of employment contract. Doe also brought a § 1983 claim, seeking declaratory and prospective injunctive relief, against the University, the Laboratory, and Nuckolls, in his official and individual capacities. Finally, the second amended complaint added class action allegations.

On May 10, 1993, the defendants moved to dismiss Doe's breach of contract claim against the University and the Laboratory on the ground that they were immune from suit under the Eleventh Amendment. In addition, the defendants moved to dismiss Doe's renewed § 1983 claim against the University and the Laboratory on the ground that neither is a "person" within the meaning of § 1983. Finally, the defendants moved to dismiss Doe's § 1983 claim against Nuckolls, in his official capacity, insofar as the claim was based upon alleged past violations of law because Nuckolls is not a "person" for such retrospective § 1983 relief.

On June 24, 1993, the district court granted the motion to dismiss all aspects relevant to this appeal. The district court dismissed the breach of contract claim against the University and the Laboratory on Eleventh Amendment ground. The district court also dismissed the § 1983 claim against the University and the Laboratory, noting that the same claim already had been dismissed in its February 5, 1993 order. Finding that the relief Doe sought - reconsideration of his employment application - did not constitute prospective injunctive relief, the district court dismissed Doe's § 1983 claim against Nuckolls in his official capacity. The district court entered a final judgment on September 16, 1993, and Doe timely filed a notice of appeal on September 22, 1993.

II

Doe contends that the district court erred when it dismissed his breach of employment contract claim against the University, as manager of the Laboratory, on the ground that the Eleventh Amendment of the United States Constitution grants the University immunity from suit in federal court. A determination of a state's immunity from suit under the Eleventh Amendment is a question of law which is reviewed *de novo*. *BV Eng'g v. University of Cal., L.A., 858 F.2d 1394, 1395 (9th Cir. 1988)*, cert. denied, *489 U.S. 1090, 103 L. Ed. 2d 859, 109 S. Ct. 1557 (1989)*.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The United States Supreme Court has extended the reach of the Eleventh Amendment to bar federal courts from presiding over any suit in which a state or "arm of the state" is a defendant. *State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199, 73 L. Ed. 262, 49 S. Ct. 104 (1929)*. However, "not all state-created or state-managed entities are immune from suit in federal court. . . . an entity may be organized or managed in such a way that it does not qualify as an arm of the state entitled to sovereign immunity." *Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991)*.

We apply a five-factor analysis to determine whether the University, acting in a managerial capacity for the Laboratory, is an arm of the state and thus entitled to Eleventh Amendment immunity from suit in federal court. *See Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1988)* (considering the source of funding for California state colleges and

universities to determine whether they are protected by Eleventh Amendment immunity), cert. denied, *490 U.S. 1081 (1989)*. The five factors are:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

ITSI TV Prods. v. Agricultural Ass'ns, 3 F.3d 1289, 1292 (9th Cir. 1993).

State liability for money judgment is the single most important factor in determining whether an entity is an arm of the state. *Durning, 950 F.2d at 1424*. We must evaluate "whether a judgment against the defendant entity under the terms of the complaint would have to be satisfied out of the limited resources of the entity itself or whether the state treasury would also be legally pledged to satisfy the obligation." Id. We conclude that this factor weighs against granting the University Eleventh Amendment immunity from suit in federal court. The Contract makes clear that the Department, and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract. "When a state entity is structured so that its obligations are its own special obligations and not general obligations of the state, that fact weighs against a finding of sovereign immunity under the arm of the state doctrine . . . ." *Id. at 1425-26*.

The second factor, whether the University performs central government functions, weighs in favor of finding that the University is an arm of the state and granting it Eleventh Amendment immunity. In analyzing this factor, we look at the overall function of the University and not merely to the specific function it performs in relation to the Laboratory. *See id. at*

1426. We look to the way California law treats the University in order to assess whether the University performs central government functions. *Id. at 1423*. The California State Attorney General has stated that the University is "a branch of the state government equal and coordinate with the Legislature, the judiciary, and the executive." *30 Ops. Cal. Att'y Gen. 162, 166 (1957)*. California case law also clearly recognizes the University as a branch of the state government. See *Ishimatsu v. Regents of Univ. of Cal., 266 Cal. App. 2d 854, 72 Cal. Rptr. 756, 762-63 (Cal. Ct. App. 1968); Regents of Univ. of Cal. v. City of Santa Monica, 77 Cal. App. 3d 130, 143 Cal. Rptr. 276, 279 (Cal. Ct. App. 1978)*. Finally, the California Education Code defines the University's mission, accords the University with exclusive jurisdiction over education in certain professions, and allocates to it the primary responsibility for "state-supported academic . . . research." Cal. Educ. Code § 66010.4(c) (West Supp. 1995). The regulation of public education is an important central government function, thus the second factor weighs in favor of granting immunity to the University.

The University is not entitled to Eleventh Amendment immunity, however, because the remaining factors, in addition to the first and most important factor, weigh against a finding of immunity. The third factor weighs against immunity because the California Constitution grants the University "the power to sue and be sued." Cal. Const. art. 9, § 9(f). The fourth factor, whether the entity may take property in its own name, also weighs against immunity. The University is vested "with the legal title and the management and disposition of the property of the university" and is given the "power to take and hold, either by purchase or by donation, . . . all real and personal property for the benefit of the university." Id. Finally, the fifth factor weighs against immunity because the California Constitution establishes a "corporation known as 'The Regents of the University of California.'" Cal. Const. art. 9, § 9(a).

The district court erred when it relied upon *Thompson v. City of L.A., 885 F.2d 1439, 1443 (9th Cir. 1989)* (holding that the

University was immune from a civil rights suit in federal court where the State of California would have been ultimately responsible for payment of the judgment) and *Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982)* (stating in dictum, that the University was an instrumentality of the state), to rule that the University is always immune from suit in federal court.

The district court should have applied the five-factor analysis to this unique situation in which the Department, and not the State of California, pays for any judgment rendered against the University in its management of the Laboratory. It is true that the University has been granted Eleventh Amendment immunity in a number of cases. See, e.g., *Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 257, 79 L. Ed. 343, 55 S. Ct. 197 (1934); Thompson, 885 F.2d at 1443; B.V. Eng'g, 858 F.2d at 1395* (citing *Jackson, 682 F.2d at 1350); Vaughn v. Regents of the Univ. of Cal., 504 F. Supp. 1349, 1351-54 (E.D. Cal. 1981)*. However, previous grants of immunity in contexts where the State of California is financially responsible for the University do not automatically translate into immunity in this unique situation. *Vaughn, 504 F. Supp. at 1352-54* (examining the pertinent factors as they relate to the University in order to determine whether the University is entitled to Eleventh Amendment immunity, rather than blindly asserting immunity).

The University is an enormous entity which functions in various capacities and which is not entitled to Eleventh Amendment immunity for all of its functions. See, e.g., *Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 940 (Fed. Cir. 1993)* (recognizing that Congress has abrogated the University's immunity from suit in federal court for violation of patent law), cert. denied, *114 S. Ct. 1126 (1994); In re Holoholo, 512 F. Supp. 889, 901-02 (D. Haw. 1981)* (finding that the University waived its Eleventh Amendment immunity by signing a government contract that contemplated possible suits against it in federal court and by entering into a federally regulated area),

superseded by statute, not in relevant part, as stated in, *Bator v. Judiciary, Adult Probation Div., 1992 U.S. Dist. LEXIS 22214* (D. Haw. May 20, 1992). The source of funding in each situation, in addition to the four other factors for determining Eleventh Amendment immunity, must be examined closely to ascertain that the University is indeed functioning as an arm of the state.

The University argues that the district court in *Holoholo, 512 F. Supp. at 895,* held that the University is an arm of the state despite an indemnification provision similar to the one in the Contract in this case. The district court in that case held that "since the [University] depends upon appropriations by the California Legislature, any damages awarded against the [University] would, absent insurance or other indemnification, come from the state treasury." *Id. at 895* (emphasis added). In making that statement, the district court had not considered the specific indemnification provision in the contract between the University and the United States and later acknowledged that "the exact nature and extent of the indemnification are not clear[,]" but that the indemnification provision "could render the Eleventh Amendment inapplicable to these state defendants [including the University]." *Id. at 899 n.14.*

After applying the five-factor analysis, we find that the University, acting in a managerial capacity for the Laboratory, has not satisfied the burden of proving that it is entitled to Eleventh Amendment immunity. Because we hold that the University, in this specific instance, is not entitled to Eleventh Amendment immunity from suit in federal court, we need not address whether the University has waived or Congress has abrogated the University's immunity. See *BV Eng'g, 858 F.2d at 1396.*

III

Doe next contends that the district court erred when it dismissed his § 1983 claim against Nuckolls, in his official capacity. We have determined that the University is not protected by the Eleventh Amendment from suit in federal court because the

University, in this particular instance, is not functioning as an arm of the state. Because we hold that the University is not an arm of the state in this instance, it is a "person" under § 1983. See *Will v. Michigan Dep't of State Police, 491 U.S. 58, 70, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989);* see also *Fuchilla v. Layman, 109 N.J. 319, 537 A.2d 652, 654* (N.J.), cert. denied, *488 U.S. 826 (1988).* Nuckolls, acting as the director of the University-managed Laboratory, is therefore not a state official but a "person" who is fully liable under § 1983. See *Thompson, 885 F.2d at 1442-43* ("only those governmental entities which are 'persons' within the meaning of § 1983 can be held liable under § 1983.").

Because we hold that the University and Nuckolls, acting in his official capacity, are fully liable to suit under § 1983, we need not address the question of whether reconsideration of Doe's employment by the Laboratory constitutes prospective injunctive relief. Doe may sue both the University and Nuckolls in federal court regardless of whether the relief he seeks constitutes prospective or retrospective relief. We remand to the district court for further proceedings in accordance with our ruling. We deny Doe's request for attorney's fees because the defendants brought forth a legitimate argument on the basis of Eleventh Amendment immunity.

REVERSED and REMANDED.

CANBY, Circuit Judge, dissenting:

With all respect to the majority, I disagree with its conclusion that the Eleventh Amendment does not bar this action against the University and its officers acting in their official capacities.

As the majority opinion recognizes, we have previously held that the University of California is an arm of the California State Government entitled to Eleventh Amendment immunity from suit in federal court. E.g., *Thompson v. City of Los Angeles, 885*

F.2d 1439, 1443 (9th Cir. 1989) ("It has long been established that UC is an instrumentality of the state for purposes of the Eleventh Amendment"); *BV Engineering v. Univ. of Calif., Los Angeles, 858 F.2d 1394, 1395 (9th Cir. 1988)*, cert. denied, *489 U.S. 1090, 103 L. Ed. 2d 859, 109 S. Ct. 1557 (1989)*. In my view, these cases are controlling, and there is no call to reassess the status of the University in the absence of a change in its structure. If the University is the defendant, and judgment is sought against the University, the case may not be brought in federal court unless the immunity has been waived. *BV Engineering, 858 F.2d at 1396.*

The majority, however, does decide anew the question of the University's immunity. In so doing, it reaches an incorrect result. The majority applies a five-factor test that originated in *Mitchell v. Los Angeles Community College District, 861 F.2d 198, 201 (9th Cir. 1988)*, cert. denied, *490 U.S. 1081 (1989)*, and was repeated in *Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991)*, and *ITSI TV Productions, Inc. v. Agricultural Associations, 3 F.3d 1289 (9th Cir. 1993)*. The listed factors are:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Id. at 1292. The majority here agrees that factor [2] favors immunity; the University has long been recognized as performing functions of the central government. The majority states, however, that factors [3], [4], and [5] work against immunity, because the University may sue or be sued, may take property in its own name, and enjoys corporate status. But none of these three attributes of the University of California has changed since we held it to be entitled to Eleventh Amendment immunity. Once

we have decided that the University is an arm of the Government of California for Eleventh Amendment purposes, the role that these structural factors play should be put to rest.

The crux of the majority's decision, as its opinion states, lies in the first factor. "The source from which the sums sought by the plaintiff must come is the most important single factor in determining whether the Eleventh Amendment bars federal jurisdiction." *Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1349 (9th Cir. 1981)*, aff'd sub nom. *Kush v. Rutledge, 460 U.S. 719, 75 L. Ed. 2d 413, 103 S. Ct. 1483 (1983)*. In my view, however, this factor must be viewed as a legal, not an economic matter. "The question is whether the state treasury is legally obligated." *Durning, 950 F.2d at 1425 n.3.*

No one has disputed that a judgment against the University of California is a legal obligation of the State of California. The majority opinion concludes, however, that the agreement of the United States to "indemnify and hold the University harmless against any . . . judgment or liability" arising out of its management of the Laboratory changes the Eleventh Amendment analysis. But that contractual clause is a separate matter. A judgment in this case will be a legal liability of the State of California. The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment. Doe, if he wins his case, must execute his judgment against the State, not the United States.

Several of our decisions establish that Eleventh Amendment immunity turns on the formal legal liability of the State, and not the economic impact of the judgment. In *Markowitz v. United States, 650 F.2d 205, 206 (9th Cir. 1981)*, we held that a State was entitled to Eleventh Amendment immunity even if it had liability insurance that would ultimately pay the judgment. It is true that part of our reasoning was that state funds pay the insurance premiums, *id.*, but the same indirect economic consequences are present here. If the United States did not agree to indemnify the University, the University's charge for managing

the Laboratory would have to be higher. Lower receipts by the University are a form of insurance premium payment to the United States.

Conversely, the fact that a State volunteers to pay a judgment incurred by an agency does not create Eleventh Amendment immunity because the question is whether the state has a legal liability to pay the judgment. *Durning, 950 F.2d at 1425, n.3.* Indeed, a suit against an individual officer does not become a suit against the State for Eleventh Amendment purposes even if a state statute provides that the officer may sue the State to recover indemnity. *Blaylock v. Schwinden, 862 F.2d 1352, 1353-54 (9th Cir. 1988); Demery v. Kupperman, 735 F.2d 1139, 1147-48 (9th Cir. 1984),* cert. denied, *469 U.S. 1127 (1985).* The question is not who pays in the end; it is who is legally obligated to pay the judgment that is being sought. Here it is the State.

One difficulty with taking the federal indemnity agreement into account is that it is a judicial exercise that has no natural boundary. In deciding the threshold question of Eleventh Amendment immunity, we can determine from the pleadings before us and the state statutes whether the judgment that is sought would run against the State. It is far more difficult to determine whether the State, after such a judgment was rendered against it, would have rights of action against third parties that might lead it eventually to recoup the judgment. In this case, there is a relatively clear indemnity agreement, but does the United States have any defenses to a claim of indemnity? In the next case the State might not have the benefit of an indemnity agreement, but might have a common-law cause of action against a third party. Must we assess the State's likelihood of success in order to decide the Eleventh Amendment question?

I would avoid all of these difficulties, first, by relying on our established precedent holding that the University of California is entitled to Eleventh Amendment immunity. If I failed in that approach, I would hold that the first Mitchell factor rendered the University immune, because the judgment sought against it would

be a legal liability of the State. The University officials being sued in their official capacity would then share in the Eleventh Amendment immunity of the State. *Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989).* The result would be to affirm the judgment of the district court that the Eleventh Amendment bars it from entertaining this action.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D.,	)	
	)	
Plaintiff,	)	
	)	No. C-92-2284 SAW
vs.	)	
	)	
LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, CLARK GROSECLOSE, ROBERT PERRET, ROBERT PERKO, UNIVERSITY OF CALIFORNIA, DAVID GARDNER,	)	
Defendants.	)	

Decided and Filed February 5, 1993

MEMORANDUM AND ORDER

I. BACKGROUND

Plaintiff Dr. John Doe, PhD.,[1] is a mathematical physicist. Plaintiff alleges that he was offered, and in June of 1991, accepted, a position as a physicist at Defendant Lawrence

[1] Plaintiff asserts that he cannot sue in his own name because "to do so would cause him to be barred from essentially all professional employment."

Livermore National Laboratory ("Lab"). The Lab is operated by the University of California ("UC") under contract with the U.S. Department of Energy ("DOE").[2] The offer for employment included a salary of $6,100 per month and a requirement that Plaintiff obtain a security clearance from DOE.[3] Plaintiff further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because the Lab and its personnel concluded that Plaintiff could not obtain a security clearance from DOE.

On October 22, 1992, Plaintiff filed his first amended complaint, alleging breach of employment contract against Defendants Lab, Nuckolls, UC, and Gardner; and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim"), against Defendants Lab, Nuckolls, Groseclose, Perret, Perko, UC, and Gardner.[4] Defendants Nuckolls and Gardner move to dismiss the breach of contract claim against them on the ground that they are not parties to an employment contract with Plaintiff.[5] Defendants UC, Lab, Gardner, and Nuckolls move to

[2] Defendant John Nuckolls is Director of the Lab. Defendant David Gardner is President of UC. Defendants Clark Groseclose, Robert Perret, and Robert Perko are employed by UC at the Lab.

[3] Plaintiff asserts that the employment contract provided him a "reasonable period of time after he became an employee" of the Lab in which to obtain a security clearance. Defendants disagree, asserting that the employment offer was "conditioned upon Plaintiff's being able to obtain the requisite security clearance."

[4] Plaintiff also alleged failure to enforce security regulations against federal Defendants DOE, James Watkins (Secretary of Energy), and Richard Claytor (Assistant Secretary of Energy for Defense Programs). On November 25, 1992, the parties agreed to dismiss, with prejudice, all causes of action against the federal defendants.

[5] Plaintiff concedes that only UC may be liable for the breach of employment contract claim. Accordingly, Nuckolls and Gardner's motion to dismiss the contract claim against them is granted.

dismiss the Section 1983 claim on the ground that they are not "persons" within the meaning of 42 U.S.C. § 1983. Defendants Groseclose, Perret, Perko, and Nuckolls move to dismiss the Section 1983 claim on the grounds that it is barred by the statute of limitations and it fails to state a claim upon which relief can be granted.

II. DISCUSSION

A. The Meaning of "Person" Under Section 1983

Defendants Lab, UC, Nuckolls, and Gardner assert that they must be dismissed from the Section 1983 claim for relief because they are not "persons" within the meaning of 42 U.S.C. § 1983.[6]

States, and governmental entities which are considered "arms of the state" for Eleventh Amendment purposes are not "persons" within the meaning of Section 1983, and are thus not subject to Section 1983 liability. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989). UC is an arm of the state for purposes of the Eleventh Amendment. *See Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982). Accordingly, Defendants UC and Lab (an entity operated by UC) are not "persons" within the meaning of Section 1983, and Plaintiff's Section 1983 cause of action against them is dismissed.

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[6] 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Suits against officials in their official, as opposed to individual, capacities are not suits against "persons" within the meaning of Section 1983. *Will*, 491 U.S. at 70-71. Because Defendants Gardner and Nuckolls are being sued in their official capacities, they are not "persons" within the meaning of Section 1983 and therefore Plaintiff's Section 1983 cause of action against them in their official capacities is dismissed.[7] Because Defendant Nuckolls has also been sued in his individual capacity, Plaintiff's Section 1983 cause of action against him in this capacity is not barred under Section 1983. *See Hafer v. Melo*, 112 S.Ct. 358 (1991).

B. Statute of Limitations Under Section 1983

Defendants Groseclose, Perret, Perko, and Nuckolls assert that the Section 1983 claims against them are barred by the statute of limitations. The statute of limitations for a Section 1983 action brought in California is one year. *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991).

Plaintiff's initial Complaint, filed June 18, 1992, alleges that Defendant Nuckolls, in his official capacity, denied Plaintiff due process and violated federal law by refusing to employ Plaintiff at the Lab in July of 1991. Plaintiff's First Amended Complaint, filed October 22, 1992 (more than one year after the actions complained of occurred), alleges the same violations against new Defendants Groseclose, Perko, and Perret, in their individual capacities, and adds Defendant Nuckolls in his individual capacity. Thus, unless the claims alleged in the First Amended Complaint "relate back" to the initial Complaint, Plaintiff's 1983 claims against these persons are time-barred.

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[7] One exception to the rule disallowing Section 1983 claims against persons sued in their official capacities is where the plaintiff seeks prospective injunctive relief. *See Quern v. Jordan*, 440 U.S. 332, 337 (1978). This exception is not applicable here, however, because Plaintiff has not prayed for such relief.

1. Defendants Groseclose, Perret, and Perko

Under Fed. R. Civ. P. 15(c), an amended complaint which names new parties will relate back to the date of the original complaint if three conditions are met. First, the claims asserted in the amended complaint must have "arisen out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Second, the party to be named by the amended complaint must have "received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits." Third, the party to be named by amendment "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." *Tafari v. Chevron Corp.*, 1992 U.S. Dist. LEXIS 19085 (N.D. Cal. 1992) (quoting Fed. R. Civ. P. 15(c)).

Plaintiff has submitted no evidence that Defendants Groseclose, Perret, or Perko knew or should have known that, but for Plaintiff's mistake concerning their identities, the initial complaint would have been brought against them. Indeed, Plaintiff has not even alleged that a mistake was made when the initial complaint was filed. Because Plaintiff has not met the third condition required by Fed. R. Civ. P. 15(c), the Section 1983 claims brought against Defendants Groseclose, Perret, and Perko in First Amendment Complaint do not relate back to the initial Complaint, and are therefore time-barred. *See Hill v. Shelander*, 924 F.2d 1370, 1376 (7th Cir. 1991) (quoting *Wood v. Worachek*, 618 F.2d 1225 (7th Cir. 1980)) ("[A] new defendant cannot normally be substituted or added by amendment after the statute of limitations has run.").

2. Defendant Nuckolls

Unlike Defendants Groseclose, Perret, and Perko, however, Defendant Nuckolls was named in the initial complaint. The initial complaint named Defendant Nuckolls in his official

capacity, and the First Amended Complaint merely added Nuckolls as a Defendant in his individual capacity.

According to the Advisory Committee Note to the 1991 amendments to Rule 15(c), "the rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." The amendment aims to protect a plaintiff from a statute of limitations defense "where the original complaint sues the correct party but identifies him by a technically incorrect name." *Hill*, 924 F.2d at 1374 n.2. Such is the case here. Defendant Nuckolls was properly identified in the initial Complaint but was incorrectly named in his official capacity, rather than in his individual capacity. *See id.* As a Defendant in the initial Complaint, Nuckolls had notice of Plaintiff's claims against him within the limitations period. Accordingly, the Section 1983 claim brought against Defendant Nuckolls in his individual capacity relates back to the initial Complaint, and is therefore not time barred. *See id.*; *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980).

C. Failure to State a Claim Under Section 1983

A district court may dismiss a complaint or claim for relief if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Nonetheless, such motions to dismiss are disfavored and rarely granted. *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986). -Upon consideration of such a motion, the court must consider the pleadings in a light most favorable to plaintiff. *Love v. United States*, 871 F.2d 1488, 1491 (9th Cir. 1989).

Defendants assert that, notwithstanding a statute of limitations defense, Plaintiff's Section 1983 claims must be dismissed because they fail to state a claim upon which relief can be granted. Specifically, Defendants assert that the "right" which Plaintiff alleges he was deprived of (a DOE security clearance) is not recognized by law as a "right," citing *Department of the Navy v.*

Egan, 484 U.S. 518, 528 (1988) ("[N]o one has a "right" to a security clearance."). Defendants further assert that Plaintiff does not have a property interest sufficient to entitle Plaintiff to procedural due process.

Defendants' argument is not well-taken. First, Plaintiff sues not for a deprivation of a right to a security clearance, but rather alleges that he was "deprived of his constitutional right to (procedural) due process of law in the determination of his eligibility for a DOE security clearance." Plaintiff's Brief Opposing Motion to Dismiss, at 6. An analogous claim has been recognized by the Supreme Court in *Greene v. McElroy*, 360 U.S. 474, 502 (1958) ("[E]xecutive agenc[ies are not empowered] to fashion security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest."). Considering Plaintiff's allegations in a light most favorable to him, he may be able to state a cause of action based on the reasoning in *Greene*. Similarly, Plaintiff may be able to show that he is a party to a valid employment contract, and thus has a property interest sufficient to entitle him to procedural due process. *See Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1971) (university employees dismissed during the terms of their contracts have interests in continued employment which are safeguarded by due process). Accordingly, Defendants' motion to dismiss for failure to state a claim upon which relief can be granted is denied.

Accordingly, IT IS HEREBY ORDERED that:

(1) All Plaintiff's causes of action against Defendant Gardner are dismissed;

(2) Plaintiff's breach of contract cause of action against Defendant Nuckolls is dismissed;

(3) Plaintiff's Section 1983 cause of action Defendant Nuckolls in his official capacity is dismissed;

(4) Plaintiff's Section 1983 cause of action against Defendants UC, Lab, Groseclose, Perret, and Perko is dismissed;

Dated: February 5, 1993.

/s/ Stanley A. Weigel
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D., and all others similarly situated,	)	
Plaintiffs,	)	
	)	No. C-92-2284 SAW
vs.	)	
UNIVERSITY OF CALIFORNIA, LAWRENCE LIVERMORE LABORATORIES, and JOHN NUCKOLLS,	)	
Defendants.	)	

Decided June 23, 1993
Filed June 24, 1993

MEMORANDUM AND ORDER

I. BACKGROUND

Plaintiff Dr. John Doe, Ph.D, is a mathematical physicist who alleges that he was offered and accepted a position with Defendant Lawrence Livermore National Laboratory ("LLNL"). Doe further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because they concluded that Doe could not obtain a U.S. Department of Energy security clearance — a requirement for LLNL employment.

On April 7, 1993, Doe and "all others similarly situated" filed a second amended, class-action complaint alleging breach of contract and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim"). Defendants move to dismiss the Section 1983 claim against Defendants University of California ("University"), LLNL, and John Nuckolls in his official capacity. Defendants further move to dismiss the breach of contract claim against the University and LLNL. Plaintiffs oppose the motions.

II. DISCUSSION

A. Motion to Dismiss Section 1983 Claim Against the University and LLNL

On February 5, 1993, the Court held that "governmental entities which are considered 'arms of the state' for Eleventh Amendment purposes are not 'persons' within the meaning of Section 1983, and are thus not subject to Section 1983 liability." (Citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989)). The Court further held that because the University and LLNL are "arms of the state" they are not subject to Section 1983 liability. *See Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). Accordingly, the Court dismissed Doe's Section 1983 claim in the first amended complaint against the University and LLNL. *See* February 5, 1993 Memorandum and Order ("February 5 Order"), at 3.

Nonetheless, contrary to the Court's order, Plaintiffs appear to have again alleged, in the second amended complaint, a Section 1983 claim against the University and LLNL. For the reasons stated above, the Court must dismiss Plaintiffs' Section 1983 claim against these defendants.

B. Motion to Dismiss Section 1983 Claim Against John Nuckolls in his Official Capacity

On February 5, 1993, the Court held that "suits against officials in their official, as opposed to individual, capacities are

not suits against 'persons' within the meaning of Section 1983," and are thus not subject to Section 1983 liability. (Citing *Will*, 491 U.S. at 70-71.) The Court further held that because Nuckolls was being sued in his official capacity, he is not subject to Section 1983 liability. Accordingly, the Court dismissed Doe's Section 1983 claim in the first amended complaint against Nuckolls in his official capacity. *See* February 5 Order, at 3.

The Court noted in footnote 7 of the February 5 Order an exception to the rule disallowing Section 1983 claims against persons acting in their official capacity — where a plaintiff seeks prospective injunctive relief. (Citing *Quern v. Jordan*, 440 U.S. 332, 337 (1978). The Court held the exception inapplicable to Nuckolls because Doe had not prayed for such relief.

Attempting to utilize the prospective injunctive relief exception, Plaintiffs filed a second amended complaint which prays for a court order requiring Nuckolls, in his official capacity, to hire Doe at LLNL in accordance with the alleged employment contract. *See* Second Amended Complaint, at 7 ¶ (5). Plaintiff further prays for a court order requiring Doe's "application for employment at the LLNL to be reconsidered without reference to his perceived eligibility for a [Department of Energy] security clearance." Second Amended Complaint, at 7 ¶ (6).

Plaintiff's attempt is not well-taken. The Court has already held that "an injunction which would require Nuckolls to employ [Doe] at LLNL is not prospective injunctive relief because such relief relates solely to an alleged past violation of federal law." *See* March 25, 1993 Memorandum and Order ("March 25 Order") at 3. (Citing *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Further, because an injunction requiring Nuckolls to reconsider Doe's application also "relates solely to an alleged past violation of federal law," it too is not prospective injunctive relief. *See Papasan*, 478 U.S. at 277-78; *Green*, 474 U.S. at 68. Accordingly, Doe's Section 1983

claim against Nuckolls in his official capacity[1] must be dismissed.[2] *See Will*, 491 U.S. at 70-71.

C. Motion to Dismiss Breach of Contract Claim Against the University and LLNL

Defendants assert that the Eleventh Amendment bars Plaintiffs' breach of contract claim against the University and LLNL. Defendants' assertion is well-taken.

The Eleventh Amendment bars a citizen from bringing suit in federal court against their own state or "arms of the state." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1984); *Durning v. Citibank, N.A.*, 950 F.2d 1419 (9th Cir. 1991). The Eleventh Amendment does not bar such suits, however, if: (1) the state waives its immunity and consents to be sued in federal court; or (2) Congress creates a cause of action for damages against an unconsenting state. *See BV Eng'g v. University of Cal.*, 858 F.2d 1394, 1395-96 (9th Cir. 1988).

The Court has held that the University and LLNL are "arms of the state" for Eleventh Amendment purposes. *See* February 5 Order, at 3. The Court has also held that California has not waived its immunity and consented to be sued in federal court. *See* March 25 Order, at 3 n.5. Further, Plaintiffs' breach of contract claim is a state cause of action, not one which is congressionally created. Accordingly, because the Eleventh Amendment bars Plaintiffs' suit against the University and LLNL,

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[1] Because Plaintiffs' claim against Nuckolls in his individual capacity is not barred by Section 1983, it is not dismissed. *See Hafer v. Melo*, 112 S. Ct. 358 (1991).

[2] Because members of the class (other than Doe) do seek prospective injunctive relief, their Section 1983 claim against Nuckolls in his official capacity is not dismissed.

the breach of contract claim against these defendants must be dismissed. *See BV Eng'g*, 858 F.2d 1394.[3]

Accordingly, IT IS HEREBY ORDERED that:

(1) Plaintiffs' Section 1983 claim against the University and LLNL is DISMISSED with prejudice;

(2) Plaintiff Doe's Section 1983 claim against John Nuckolls in his official capacity is DISMISSED with prejudice; and

(3) Plaintiffs' breach of contract claim against the University and LLNL is DISMISSED with prejudice.

Dated: June 23, 1993.

/s/ Stanley A. Weigel
Judge

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[3] Doe requests that if the Eleventh Amendment bars Plaintiffs' claims in federal court, the Court transfer the case to state court rather than dismiss it. Doe cites no support for this request, and the Court finds no such precedent. Doe's request is accordingly denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D., and all others similarly situated, Plaintiffs, vs. UNIVERSITY OF CALIFORNIA, LAWRENCE LIVERMORE LABORATORIES, and JOHN NUCKOLLS, Defendants	)	No. C-92-2284 SAW

Decided and Filed September 2, 1993

MEMORANDUM AND ORDER

I. BACKGROUND

Plaintiff Dr. John Doe is a mathematical physicist who alleges that he was offered and accepted a position as a physicist with Defendant Lawrence Livermore National Laboratory ("LLNL"). Doe further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because LLNL and its personnel concluded that Doe could not obtain a Department of Energy security clearance — a requirement for employment with LLNL.

Based on the foregoing allegations, on April 7, 1993, Doe and "all others similarly situated" filed a second amended, class-

action complaint against Defendants for breach of contract and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim").[1] On June 23, 1993, upon motion by Defendants, the Court dismissed Plaintiffs' Section 1983 claim against Defendants University of California ("UC") and LLNL, and Doe's Section 1983 claim against John Nuckolls in his official capacity. The Court further dismissed Plaintiffs' breach of contract claim against UC and LLNL.

Doe moves to certify for appeal, under Fed. R. Civ. P. 54(b), two of the dismissed claims: (1) Plaintiffs' breach of contract claim against UC; and (2) Doe's Section 1983 claim against Nuckolls in his official capacity. In the alternative, Doe moves to certify for appeal these claims under 28 U.S.C. § 1292(b). Doe further moves to stay all proceedings pending the appeal. Defendants oppose the motions for certification.

II. DISCUSSION

A. Motion for Certification Under Rule 54(b)

As noted above, Doe seeks to appeal two claims dismissed in the Court's June 23, 1993 Memorandum and Order: (1) Plaintiffs' breach of contract claim against UC; and (2) Doe's Section 1983 claim against Nuckolls in his official capacity. In order to do so, Doe seeks a final judgment on these claims pursuant to Federal Rule of Civil Procedure 54(b).

The district court has broad discretion to enter final judgment of particular claims under Rule 54(b) and to facilitate an appeal of those claims if there is no just reason for delaying the appeal. Fed. R. Civ. P. 54(b); *see also Texaco, Inc. v. Ponsdolt*, 939

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[1] Doe voluntarily dismissed the original complaint, filed June 17, 1992. On February 5, 1993, the Court dismissed in most respects Doe's first amended complaint. On March 25, 1993, the Court granted Doe's motion to file the second amended complaint.

F.2d 794, 798 (9th Cir. 1991). In considering a Rule 54(b) motion, the court should adopt a pragmatic approach, focusing on the severability of the dismissed claims from the remaining claims and efficient judicial administration. *Texaco*, 939 F.2d at 798; *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).

Under the circumstances of this case, a Rule 54(b) final judgment of the dismissed breach of contract claim against UC and Section 1983 claim against Nuckolls in his official capacity is proper. First, the dismissed claims are severable from the remaining claims. The dismissed claim against Nuckolls in his *official* capacity is solely for *injunctive* relief. The only remaining claim brought by Doe is against Nuckolls in his *individual* capacity and only for *damages*. The dismissed claim against UC is a relatively straightforward breach of contract claim. There are no remaining claims against UC. There is a remaining claim against Nuckolls in his official capacity for injunctive relief, but that claim is brought by the class — which has yet to be certified.

Second, entering final judgment of the claim would result in efficient judicial administration. Doe has stated that he desires to remain in federal court, "but can sensibly do so only" if the federal court has jurisdiction to consider the breach of contract claim against UC. *See* Brief Supporting Motion for Stay and for Certification to Appeal 2. Presumably, if Doe loses on appeal, he will refile the complaint in state court. Therefore, by certifying the claims for appeal, the Court may be prevented from expending judicial resources in adjudicating the remaining claims, which would be rendered moot if Plaintiffs proceed in state court.

In light of the foregoing, the Court can find no just reason for delaying appeal on Plaintiffs' breach of contract claim against UC and Doe's Section 1983 claim against Nuckolls in his official

capacity. Accordingly, Doe's motion to certify these claims under Rule 54(b) is granted.[2]

B. Motion for Stay Pending Appeal

Doe moves to stay the Court proceedings pending resolution of the certified appeal by the Ninth Circuit.

If a district court certifies claims for appeal pursuant to Rule 54(b), it should stay all proceedings on the remaining claims if the interests of efficiency and fairness are served by doing so. *See Matek v. Murat*, 638 F. Supp. 775, 784 (C.D. Cal. 1986). As noted above, it is presumed that if Plaintiffs lose on appeal, they will refile the action in state court. Accordingly, the interests of efficiency and fairness are served by staying further proceedings in this Court because the remaining claims would be rendered moot if Plaintiffs proceed in state court. Moreover, Defendants do not object to Doe's request for a stay. *See Armstrong v. A.C. & S., Inc.*, 649 F. Supp. 161, 162 (W.D. Wash. 1986) (motion for stay granted if motion unopposed). For the foregoing reasons, Doe's motion to stay is granted.

Accordingly, it is HEREBY ORDERED that:

(1) Pursuant to Federal Rule of Civil Procedure 54(b), the Clerk of the Court shall enter judgments of dismissal as to Plaintiffs' claim for breach of contract against Defendant University of California and Plaintiff Doe's claim under 42 U.S.C. § 1983 against Defendant John Nuckolls in his official capacity;

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[2] Because the Court grants Doe's motion for certification under Rule 54(b), his alternative motion for certification under 28 U.S.C. § 1292(b) is denied, as being moot.

(2) All proceedings in this action in this Court are stayed pending decision by the Ninth Circuit on the appeal of the foregoing claims; and

(3) Commencing ninety (90) days from now, Plaintiff Doe shall report to the Court the status of said appeal and shall do so every thirty (30) days thereafter.

Dated: September 2, 1993.

/s/ Stanley A. Weigel
Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DR JOHN DOE, PHD.	)	
	)	
Plaintiff,	)	
	)	C 92-2284 SAW
vs	)	
	)	JUDGMENT
UNIVERSITY OF CALIFORNIA, et al.,	)	
	)	
Defendants.	)	

Filed September 13, 1993

In accordance with the *Memorandum and Order* of September 2, 1993,

IT IS HEREBY ADJUDGED that Plaintiff's claim for breach of contract against Defendant University of California and Plaintiff's claim under 42 U.S.C. Section 1983 against Defendant John Nuckolls in his official capacity are dismissed.

September 13, 1993

/s/ Stanley A. Weigel
Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, Ph.D., and all others similarly situated,	)	
	)	
	)	No. 93-16792
Plaintiffs-Appellants,	)	
	)	D.C. No. CV-92-02284-SAW
	)	Northern District of California
v.	)	
	)	
LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, Director,	)	ORDER
	)	
Defendants,	)	
	)	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	
	)	
Defendant-Appellee.	)	

Filed January 19, 1996

Before: CHOY, CANBY AND T.G. NELSON, Circuit Judges.

There having been no objection made by appellants Dr. John Doe, Ph.D., et al., to the request made by appellees John Nuckolls and the University of California that this court take judicial notice of certain excerpts from the publication entitled "The University of California Campus Financial Schedules 1991-1992", that request is hereby GRANTED.

A majority of the panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc. Judge Canby has voted to grant the petition and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FILED APR 7, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D., and all others similarly situated,	) No. C-92-2284 SAW) Class Action
Plaintiffs,	) Plaintiffs') SECOND AMENDED) COMPLAINT) FOR
v.	
LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, Director, and the UNIVERSITY OF CALIFORNIA,	) INJUNCTION & DAMAGES) UNDER § 1983) AND) SPECIFIC PERFORMANCE) & DAMAGES) FOR
Defendants.	) BREACH OF EMPLOYMENT) CONTRACT) *CATEGORY*: CIVIL RIGHTS, JOBS

Introduction

1. Plaintiff Doe is a mathematical physicist who cannot sue in his own name because to do so would cause him to be barred from essentially all professional employment as such. Defendants Lawrence Livermore National Laboratory ("LLNL") and the University of California ("UC") refuse to perform their contract of employment with Plaintiff Doe because their personnel determined that Plaintiff Doe could not obtain a security clearance from the Department of Energy ("DOE"), in violation of 42 U.S.C. § 1983. The alleged class consists of all applicants for employment at the LLNL who were, are and will be subject to Defendants' policy and practice of making employment suitability

decisions based on their estimate of the time required for these applicants to obtain security clearances from the DOE.

Plaintiffs seek a declaratory judgment declaring the foregoing policy and practice of Defendants an unconstitutional deprivation of their right to procedural due process under the Fifth Amendment and a permanent injunction prohibiting Defendants from using, condoning, or tolerating it. In addition, Plaintiff Doe seeks specific performance of the alleged employment contract or an injunction under 42 U.S.C. § 1983 requiring him to be hired under the terms of the foregoing contract, as well as appropriate back pay at over $70,000 per year for himself, and an attorney's fee.

Jurisdiction

2. Jurisdiction is based on 28 U.S.C. § 1331 (federal question) and on 28 U.S.C. § 1332 (diversity of citizenship). The amount in controversy easily exceeds $50,000. This action arises, *inter alia*, under Executive Order 10865, DOE Regulations in Title 10, Part 710 of the Code of Federal Regulations, and 42 U.S.C. § 1983.

Venue

3. Venue is proper in the Northern District of California because Defendant LLNL is located in Livermore and Defendant University of California operates a university in Berkeley.

Parties

4. Plaintiff Dr. John Doe, Ph.D., is a mathematical physicist and a resident of the State of New York. All members of the alleged class are applicants for employment at the LLNL whose positions require security clearances from the DOE or for whom applications for such clearances have usually been submitted to the DOE by Defendants.

5. Defendant Lawrence Livermore National Laboratory ("LLNL") is an entity owned by the United States Department of Energy ("DOE") and operated by Defendant University of California ("UC") under contract with the DOE. Except for security clearances, Defendant UC has complete and ultimate control of all employment matters regarding LLNL personnel, including applicants for LLNL employment, and LLNL employees are paid by the UC. The DOE has sole and exclusive authority over security clearances for LLNL employees and applicants for LLNL employment.

6. Defendant John Nuckolls is the Director of the LLNL, and he is sued in both his official and individual capacities.

Factual Allegations for All Claims

7. Plaintiff Dr. John Doe, Ph.D., is a mathematical physicist who was graduated *summa cum laude* from Princeton in 1976, received an M.A. from Harvard in 1977, and a Ph.D. from Harvard in 1981. During his professional career he served as a teaching fellow at Harvard, an assistant professor at Rockefeller University, a Member of the Institute for Advanced Study at Princeton, a visiting professor at the Lawrence Berkeley National Laboratory, and a consultant on theoretical physics for the Lawrence Livermore National Laboratory (Defendant LLNL, herein). In addition, Dr. Doe has given numerous invited talks at conferences in this country and in Europe and has published over three dozen technical papers in his field.

8. From on or before October 1990 to mid-June 1991, personnel at Defendant LLNL actively recruited Plaintiff Doe as a potential employee, whom they believed was a very able theoretical physicist.

9. In mid-June 1991, Plaintiff Doe orally accepted the LLNL's oral offer of employment and accepted the LLNL's written offer of employment in writing. The offer for employment as a physicist included a salary of $6,100 per month

and a requirement that Plaintiff Doe obtain a "Q" security clearance from the DOE in a reasonable period of time after he became an employee of Defendant LLNL.

10. Shortly after Plaintiff Doe had accepted the foregoing offer, both orally and in writing, Defendant LLNL attempted to "withdraw" the offer and refused to employ Plaintiff Doe in any position. The LLNL did so because its personnel determined that Plaintiff Doe could not obtain a security clearance from the DOE in any period of time, reasonable or otherwise.

11. Federal law, including Executive Order 10865 and the DOE's security regulations, including those found in Title 10, Part 710 of the Code of Federal Regulations and the Department of Energy Acquisition Regulation (DEAR), provide that only the DOE may determine eligibility for a DOE security clearance, not any other entity such as Defendant LLNL or its employees.

12. In the months that followed, Plaintiff Doe attempted to persuade Defendant LLNL to honor its employment contract with him by means of communications between his attorney and the LLNL, his own efforts to meet with LLNL personnel, his communications with DOE personnel, and by communications between Admiral Watkins and Congressman John Dingell on Plaintiff Doe's behalf, all to no avail.

13. Defendants LLNL, Nuckolls, and University of California have an ongoing and continuing policy or custom of considering the eligibility of an applicant for employment at the LLNL for a security clearance from the Department of Energy ("DOE"), and of refraining from hiring an applicant if Defendants believe he or she will not be able to obtain such a clearance in a reasonable time, all in violation of Federal law, including Executive Order 10865 and the DOE's security regulations, including those found in Title 10, Part 710 of the Code of Federal Regulations and the Department of Energy Acquisition Regulation (DEAR).

Class Action Allegations

14. Plaintiff brings this action on behalf of himself and all others similarly situated under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The Class consists of all past, present and future applicants for employment at the Lawrence Livermore National Laboratory ("LLNL") whose positions require a security clearance from the Department of Energy ("DOE") or for whom Defendants have customarily submitted applications to the DOE for such clearances, thereby becoming subject to Defendants' unlawful policy and practice of making employment decisions based on defendants' estimate of the time required for these applicants to obtain the foregoing security clearances.

15. Defendants, through Defendant Director Nuckolls and other employees and agents who work at the LLNL, have admitted the existence and use of the foregoing policy and practice, and have stated their desire and intention to continue to use it in the future. Defendants have failed and refused to abandon this policy and practice, despite Plaintiff Doe's repeated requests that they do so.

16. There are common questions of law and fact affecting the rights of Class members who are, have been, and continue to be adversely affected by Defendants' unlawful policy and practice alleged above. These persons are so numerous that joinder is impracticable, and joinder of future members is impossible. The claims of the Representative Plaintiff are typical of those of the Class in that all allege the same discrimination by Defendants regarding the use of security clearance determinations in making employment decisions. A common relief is sought: a Declaratory Judgment that Defendants' alleged policy and practice violates the Due Process Clause of the Fifth Amendment, an Injunction enjoining all Defendants from using, condoning, or tolerating it, and back pay. The interests of the Class are adequately represented by Plaintiff John Doe, who has suffered and continues to suffer discrimination because he was and continues to be a victim of the foregoing policy and practice of the LLNL.

Defendants have acted and refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the Class as a whole.

17. Plaintiffs have no adequate remedy at law.

First Claim - Breach of Contract

18. Plaintiffs incorporate by reference all preceding paragraphs.

19. Defendants LLNL and UC breached their contract of employment with Plaintiff Doe, all to his damage in the amount of at least $6,100 per month plus benefits since July 1991.

20. The position sought by Plaintiff Doe is unique, in that his work would have begun with a project involving computer simulation of military battles in real time, to which he would have applied kinetic theory and other laws of physics. Work on this type of project is not generally available outside of a few institutions funded by the federal government, so that Plaintiff Doe is entitled to an order requiring specific performance of the alleged employment contract.

Second Claim - Violation of 42 U.S.C. Section 1983

21. Plaintiffs incorporate by reference all preceding paragraphs.

22. At all material times, Defendant Nuckolls was acting under the color of the law of the State of California and caused Plaintiff Doe and all other members of the alleged class, all citizens of the United States, to be deprived of rights secured by the United States Constitution and other federal laws, so that Defendants are liable to Plaintiffs in an action at law, suit in equity, or other proper proceeding for redress, as provided by 42 U.S.C. § 1983.

23. Defendants LLNL, Nuckolls, and University of California have a policy or custom of considering the eligibility of an applicant for employment at the LLNL for a security clearance from the Department of Energy ("DOE"), and of refraining from hiring an applicant if Defendants believe he or she will not be able to obtain such a clearance in a reasonable time, all in violation of Federal law, including Executive Order 10865 and the DOE's own security regulations, including those found in Title 10, Part 710 of the Code of Federal Regulations and the Department of Energy Acquisition Regulation (DEAR).

24. In deciding not to employ Plaintiff Doe and approving the recommendations of his subordinates not to do so, Defendant Nuckolls violated the foregoing federal law on security clearances by determining that Plaintiff Doe could not obtain a security clearance from the DOE.

25. Specifically, Defendants LLNL and Nuckolls deprived Plaintiff Doe of his right to due process of law under the Fifth Amendment by violating federal law on security clearances in deciding not to hire Plaintiff Doe, all to his damage in the amount of at least $6,100 per month plus benefits since July 1991, in violation of 42 U.S.C. § 1983.

26. In addition, Defendants LLNL and Nuckolls have deprived and will continue to deprive all Plaintiffs of their right to procedural due process of law under the Fifth Amendment by violating federal law on security clearances in deciding whether or not to hire Plaintiffs to work at the LLNL, in violation of 42 U.S.C. § 1983, thereby entitling them to appropriate declaratory relief and permanent injunctive relief.

RELIEF REQUESTED

(1) An Order certifying the alleged class;

(2) A Declaratory Judgment declaring that Defendants' policy and practice of making employment suitability decisions

based on Defendants' estimate of the time required for applicants for employment at the LLNL to obtain security clearances from the DOE is unconstitutional and unlawful;

(3) A permanent Injunction prohibiting Defendants from using, condoning, or tolerating the foregoing policy and practice;

(4) An Order for specific performance requiring Defendants LLNL and UC to employ Plaintiff Doe as an employee of the LLNL as a physicist, in accordance with the terms of the alleged contract between Plaintiff Doe and these defendants;

(5) An Injunction under 42 U.S.C. § 1983 requiring Defendant Nuckolls, in his official capacity as Director of the Lawrence Livermore National Laboratory, to cause Plaintiff Doe to be hired as a physicist at the LLNL, in accordance with the terms of the alleged contract;

(6) As a less-desirable alternative to (5), above, an Injunction under 42 U.S.C. § 1983 requiring Defendant Nuckolls, in his official capacity as Director of the LLNL, to cause Plaintiff Doe's application for employment at the LLNL to be reconsidered *without* reference to his perceived eligibility for a DOE security clearance or any other information acquired by Defendants after Plaintiff Doe informed them of his problem in obtaining a security clearance from the NSA;

(7) An Order requiring Defendants Lab, Nuckolls (in his individual capacity), and the University of California to compensate Plaintiff Doe with appropriate back pay and employment benefits that he would have received had these defendants hired him in accordance with the alleged contract, in the amount of at least $6,100 per month plus benefits, which at this time amounts to at least $100,000;

(8) An attorney's fee under 28 U.S.C. § 2412, 42 U.S.C. § 1988, and other applicable law;

(9) Costs; and,

(10) Such other and further relief, including equitable relief, as the Court may deem appropriate.

Dated: April 6, 1993

s/Richard Gayer
RICHARD GAYER, Plaintiffs' Lawyer.

MODIFICATION NO. M205, SUPPLEMENTAL AGREEMENT TO CONTRACT NO. W-7405-ENG-48:

ARTICLE VII, CL. 1 - COSTS AND EXPENSES (SEP 1991)* - DEAR 970.5204-13

(a) Compensation for contractor's services. Except for the provisions of Article XVII, "Litigation, Claims and Indemnification," payment for the allowable costs as hereinafter defined shall constitute full and complete compensation for the performance of the work under this contract.

(b) (Not applicable)

(c) Allowable costs. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and are determined to be allowable pursuant to this paragraph (c). The determination of the allowability of cost hereunder shall be based on: (1) Reasonableness, including the exercise of prudent business judgment, as defined in paragraph (f) of this clause; (2) consistent application of generally accepted accounting principles and practices that result in equitable charges to the contract work; and (3) recognition of all exclusions and limitations set forth in this clause or as elsewhere provided in this contract as to types or amounts of items of cost. Allowable costs shall not include the cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein. Failure to mention an item of cost specifically in paragraph (d) or paragraph (e) shall not imply either that it is allowable or that it is unallowable.

(d) Items of allowable cost. Subject to the other provisions of this clause, the following items of cost of work done under this contract shall be allowable to the extent indicated.

* Modified for this contract.

(1) Bonds and insurance (including self-insurance), as required by Article IX, Clause 6, "Required Bonds and Insurance-Exclusive of Government Property," and indemnification as provided in Article XVII "Litigation, Claims and Indemnification," of this contract.

(2) Communication costs, including telephone services, local and long-distance calls, telegrams, cablegrams, postage, and similar items.

(3) Consulting services (including legal and accounting), and related expenses, as approved by the Contracting Officer, except as made unallowable by paragraphs (e)(16) and (e)(26).

(4) Litigation and claims expenses, costs and judgments including interest thereon, incurred in accordance with Article XVII, Clause 1, "Litigation and Claims," and Article XVII, Clause 4, "General Indemnity," of this contract.

(5) Losses and expenses (including settlements made with the consent of the Contracting Officer) sustained by the University in the performance of this contract, except the losses and expenses expressly made unallowable under other provisions of this contract.

(6) Materials, supplies, and equipment, including freight transportation, material handling, inspection, storage, salvage, and other usual expenses incident to the procurement, use and disposition thereof, subject to approvals required under other provisions of this contract.

(7) Patents, purchased design, and royalty payments to the extent expressly provided for under other provisions in this contract or as approved by the Contracting Officer, and preparation of invention disclosures, reports and related documents, and searching the art to the extent necessary to make such invention disclosures in accordance with Article XII, Clause 1, "Patent Rights," of this contract.

(8) Laboratory employee personnel costs and related expenses incurred in accordance with the personnel appendix which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that said personnel appendix sets forth in detail personnel costs and related expenses to be allowable under this contract and is intended to document those personnel policies, practices and plans which have been found acceptable by the Contracting Officer. It is further understood and agreed that the University will advise DOE of any proposed changes in any matters covered by said policies, practices or plans which relate to this item of cost, and that the personnel appendix may be modified from time to time in writing by mutual agreement of the University and DOE without execution of an amendment to this contract for the purpose of effectuating any such changes in, or additions to, said personnel appendix as may be agreed upon by the parties. Such modifications shall be evidenced by execution of written numbered approval letters from the Contracting Officer or his representative. Types of Laboratory employee personnel costs and related expenses to be incorporated into the personnel appendix, or amendments thereto, are as follows:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; nonwork time, including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (University) committees;

(ii) Legally required contributions to old-age and survivors' insurance, unemployment compensation plans, and workers compensation plans, (whether or not covered by insurance); voluntary or agree-upon plans providing benefits for retirement, separation, life insurance, hospitalization, medical-surgical and unemployment (whether or not such plans are covered by insurance);

(iii) Travel (except foreign travel, which requires specific approval in accordance with the Article VII, Clause 13, "Foreign Travel," of this contract); incidental subsistence and other allowances of Laboratory employees, in connection with performance of work under this contract (including new employees reporting for work and transfer of employees, the transfer of their household goods and effects and the travel and subsistence of their dependents);

(iv) Employee relations, welfare, morale, etc.; programs including incentive or suggestion awards;

(v) Personnel training; including apprenticeship training programs designed to improve efficiency and productivity of contract operations, to develop needed skills, and to develop scientific and technical personnel in specialized fields required in the contract work; and

(iv) Recruitment of personnel (including help-wanted advertisement), including service of employment agencies at rates not in excess of standards commercial rates, employment office, travel of prospective employees at the request of the University for employment interviews.

(9) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property and the restoration or clean-up of site and facilities.

(10) Subcontracts and purchase orders, including procurements from University-controlled sources, subject to approvals required by other provisions of this contract.

(11) Subscriptions to trade, business, technical, and professional periodicals, as authorized through the University's annual budget process.

(12) Taxes, fees, and charges levied by public agencies which the University is required by law to pay, except those which are expressly made unallowable under other provisions of this contract.

(13) Utility services, including electricity, gas, water, and sewerage.

(14) Indemnification of the Pension Benefit Guaranty Corporation, pursuant to the Employee Retirement Income Security Act of 1974, in accordance with FAR 31.205-6(j)(3)(iv).

(15) Establishment and maintenance of bank accounts in connection with the work hereunder, including, but not limited to: service charges, the cost of disbursing cash, necessary guards, cashiers, and paymasters.

(16) Camp operations, to the extent approved by the Contracting Officer.

(17) Maintenance, inspection, repair, replacement, and transportation of construction plant and equipment to the extent not covered by rentals or insurance and as provided in rental agreements approved by the Contracting Officer.

(18) Rental for construction plant and equipment rented by the University from others at rates and under written agreements approved by the Contracting Officer.

(19) Costs and compensation associated with University management and operation of the Laboratory as described in Article V, Clauses 3, 4, 5, and 6, of this contract.

(20) Costs for University conducted research and support as described in Article VIII, Clause 2, of this contract.

(21) Fines and penalties, except those expressly made unallowable under paragraph (e)(12) of this clause.

(22) Employee assistance programs; health or first-aid clinics; house or employee publications.

(23) Net cost of operating plant-site cafeteria, dining rooms, and canteens attributable to the performance of the contract.

(e) Items of unallowable costs. The following items of costs are unallowable under this contract to the extent indicated, except as may be otherwise approved in writing by the Contracting Officer or as provided elsewhere in this contract:

(1) Advertising and public relations costs designed to promote the University or the Laboratory or its products, including the costs of promotional items and memorabilia such as models, gifts and souvenirs, and the cost of memberships in civic and community organizations; except those advertising and public relations costs:

(i) Specifically required by the contract,

(ii) Approved in advance by the Contracting Officer as clearly in furtherance of work performed under the contract,

(iii) That arise from requirements of the contract and that are exclusively for recruiting personnel, acquiring scarce items for contract performance, disposing of scrap or surplus materials, the transfer of federally owned or originated technology to State and local governments and to the private sector, or acquisition of contract-required supplies and services, or

(iv) Where the primary purpose of the activity is to facilitate contract performance in support of the DOE mission.

The term "designed to promote" does not include: the use of University or Laboratory name or logos in conjunction with correspondence and press releases or imprinted on materials to be used by Laboratory employees in the course of work performance, including, but not limited to stationery, binders, writing implements, displays, presentations, buttons identifying employees and/or their programs; the creation and display or performance of models, films, videotapes, audio presentations and the like, describing the technical, scientific, science education, technology transfer, and

business affirmative action efforts or achievements of the Laboratory; the operation of museums and public access centers.

(2) Bad debts (including expenses of collection) and provisions for bad debts arising out of other business of the University.

(3) Proposal expenses and costs of proposals except in the conduct of the Work for Others program.

(4) Bonuses and similar compensation under any other name, which (i) are not pursuant to an agreement between the University and employee prior to the rendering of the services or an established plan consistently followed by the University, (ii) are in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder, or (iii) provide total compensation to an employee in excess of reasonable compensation for the services rendered.

(5) Central and branch office expenses of the University, except as specifically set forth in the contract.

(6) Commissions, bonuses, and fees (under whatever name) in connection with obtaining or negotiating for a Government contract or a modification thereto, except when paid to bona fide employees or bona fide established selling organizations maintained by the contractor for the purpose of obtaining Government business.

(7) Contingency reserves, provisions for.

(8) Contributions and donations, including cash, University-owned property and services, regardless of the recipient.

(9) Depreciation in excess of that calculated by application of methods approved for use by the Internal Revenue Code of 1954, as amended, including the straight-line, declining balance (using a rate not exceeding twice the rate which would have been used had the depreciation been computed under the straight line method), or sum-of-the-years digits method, on the basis of expected useful life,

to the cost of acquisition of the related fixed assets less estimated salvage or residual value at the end of the expected useful life.

(10) Dividend provisions or payments and, in the case of sole proprietors and partners, distributions of profit.

(11) Entertainment, including costs of amusement, diversion, social activities; and directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities; costs of membership in any social, dining or country club or organization, except the costs of such recreational activities for on-site employees as may be approved by the Contracting Officer or provided for elsewhere in this contract.

(12)(i) Fines or penalties caused directly by bad faith or willful misconduct on the part of some officer or officers of the Regents of the University of California or any person acting as Laboratory Director; or

(ii) Criminal penalties assessed pursuant to 223(c) of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2273(c)) and as provided for in Article XVII, Clause 2(j), "Nuclear Indemnity Agreement," of this contract.

(13) Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of DOE applicable to transfers of such property to the University from others.

(14) Insurance (including any provisions of a self-insurance reserve) on any person where the University under the insurance policy is the beneficiary, directly or indirectly, and insurance against loss of or damage to Government property as defined in Article IX, Clause 1, "Property," of this contract.

(15) Interest, however represented (except (i) interest incurred in compliance with Article VII, Clause 14, "State and Local Taxes," of this contract, or, (ii) imputed interest costs relating to leases

classified and accounted for as capital leases under generally accepted accounting principles (GAAP), provided that the decision to enter into a capital leasing arrangement has been specifically authorized and approved by the DOE in accordance with applicable procedures and such interest costs are recorded in an appropriately specified DOE account established for such purpose), bond discounts and expenses, and costs of financing and refinancing operations.

(16) Legal, accounting, and consulting services costs incurred in connection with: the preparation and issuance of stock, rights, organization or reorganization; the prosecution of judicial or administrative proceedings against the United States or the defense of judicial or administrative proceedings and investigations under the Major Fraud Act into alleged violations of statutes or regulations (as those terms are used in the Major Fraud Act) by the United States against the University, except as permitted by the Equal Access to Justice Act (28 U.S.C. § 2412 and 5 U.S.C. § 504) and the Major Fraud Act (41 U.S.C. § 256) and except as otherwise approved by the Contracting Officer; and the prosecution of patent infringement litigation, except where incurred pursuant to the Litigation and Claims clause of this contract. This provision shall not be applicable to costs incurred by the University in fulfillment of its responsibilities under this contract in normal, routine or informal interactions such as routine inspections, audits, and reviews of work by sponsors, with a state or the federal government.

(17) Losses (including litigation expenses, Counsel fees, and settlements) on, or arising from the sale, exchange, or abandonment of capital assets, including investments; losses on other contracts, including the University's contributed portion under cost-sharing contracts; losses in connection with price reductions to and discount purchases by employees (excluding losses arising from the cost of operating cafeteria and food service operations) and other from any source; and losses where such losses or expenses:

(i) Are compensated for by insurance or otherwise or which would have been compensated by insurance required by law or by written

direction of the Contracting Officer but which the University failed to procure or maintain through the fault of some officer or officers of The Regents of the University of California or any person acting as Laboratory Director;

(ii) Result from willful misconduct or lack of good faith on the part of some officer or officers of The Regents of the University of California or any person acting as Laboratory Director;

(iii) Represent liabilities to third persons from which the contractor has expressly accepted responsibility under other terms of this contract.

(18) Maintenance, depreciation, and other costs incidental to the contractor's idle or excess facilities (including machinery and equipment), other than reasonable standby facilities.

(19) Membership in trade, business, and professional organizations, except as approved by the Contracting Officer.

(20) Precontract costs, except as expressly made allowable under the provisions in this contract.

(21) (Not applicable)

(22) (Not applicable)

(23) (Not applicable)

(24) Taxes, fees, and charges in connection with financing, refinancing, or refunding operations, including listing of securities on exchanges, taxes which are paid contrary to Article VII, Clause 14, "State and Local Taxes" (provided that the Government's recovery of state and local taxes inadvertently paid shall be limited to any refund action pursued at the direction of the Contracting Officer), federal taxes on net income and excess profits, special assessments on land which represent capital improvement and taxes on accumulated funding deficiencies of, or prohibited transactions

involving, employee deferred compensation plans pursuant to Section 4971 or Section 4975 of the Internal Revenue Code of 1954, as amended, respectively.

(25) Travel expenses of the officers, proprietors, executives, administrative heads and other employees of the University's central office or branch office organizations concerned with the general management, supervision, and conduct of the University's business as a whole, except to the extent that particular travel is in connection with the contract or approved by the Contracting Officer.

(26) Salary or other compensation (and expenses related thereto) of any individual employed under this contract as a consultant or in another comparable employment capacity who is an employee of another organization and concurrently performing work on a full-time annual basis for that organization under a cost-type contract with DOE, except to the extent that cash payment therefor is required pursuant to the provisions of this contract or procedure of DOE applicable to the borrowing of such an individual from another cost-type contractor.

(27) (Not applicable)

(28) Special construction industry "funds" financed by employer contributions for such purposes as methods and materials research, public and industry relations, market development, and disaster relief, except as specifically provided elsewhere in this contract.

(29) Late premium payment charges related to employee deferred compensation plan insurance.

(30) Facilities capital cost of money. (CAS 414 and CAS 417).

(31) Cost incurred to influence (directly or indirectly) legislative action on any matter pending before Congress or a State legislature as delineated in Article VII, Clause 16, "Legislative Lobbying Cost Prohibition," of this contract.

(32) Commercial automobile rental expenses (exclusive of employee automobile rental while on travel, or short term use not to exceed 60 days) unless approved by the Contracting Officer.

(33) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the Government where the University, its agents or employees, has pleaded nolo contendere to a charge of fraud or similar proceeding or where such charge results in a judgment or a conviction; provided, however, that such costs incurred in defense of a civil fraud or similar proceeding brought against an employee or agent shall be allowable in accordance with Article XVII, Clause 1, "Litigation and Claims."

(34) Costs of alcoholic beverages.

(35) (Not applicable)

(36) Cost of attendance at any meeting or conference which the Contracting Officer may determine to be unallocable or unreasonable for application to this contract.

(f) Reasonable costs. A cost shall be considered reasonable if the nature of the goods or services acquired or applied, and the amount involved therefor, reflect the action that a prudent person would have taken under the circumstances prevailing at the time the decision to incur the cost was made. Major considerations involved in the determination of the reasonableness of a cost are: (i) whether or not the cost is of a type generally recognized as necessary for the operation of the Laboratory or the performance of the contract; (ii) the restraints or requirements imposed by such factors as arm's-length bargaining, Federal and State laws and regulations, and contract terms and conditions; (iii) whether or not the individuals concerned acted with due prudence in the circumstances, considering their responsibilities to the Laboratory, its employees, the Government, and the public at large; and (iv) the extent to which the actions taken with respect to the incurrence of the cost are consistent with established University policies and practices

applicable to the work of the University generally, including federally-sponsored agreements.

(g) In the event the University fails to obtain a prior approval required of any action by the terms of this contract, the Contracting Officer may give after the fact approval to the extent that the Contracting Officer can determine that the Government sustained no loss as the result of the failure to obtain the prior approval or that such failure did not adversely affect the interests of the Government.

ARTICLE XVII, CL. 1 - LITIGATION AND CLAIMS (JUL 1991)* - DEAR 970.5204-31

(a) Initiation of Litigation and Claims. The University may, with the prior written authorization of the Contracting Officer, and may, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. If the University declines a government request to initiate litigation, it shall assign its rights and interests in the matter to permit the government to undertake the action. The cost and expense of litigation and claims incurred pursuant to this paragraph (a) shall be allowable costs under this contract. The University shall proceed with the litigation it undertakes, in good faith and as directed from to time by the Contracting Officer; provided, however, the University has the right to decline the directions of the Contracting Officer and may proceed with the litigation under its sole discretion and for its sole benefit, if the University assumes full responsibility for its litigation costs, including judgments.

(b) Defense and Settlement of Litigation and Claims.

(1) Except for litigation or claims between the United States and the University, and except for litigation or claims commenced by a State for violation of federal or state statute or regulation, the University shall give the Contracting Officer immediate notice in writing of any action, including any proceeding before an administrative agency, filed against the University arising out of the performance of this contract, and of any claim against the University, the cost and expense of which is allowable under this contract. The cost and expenses of litigation and claims, including judgments, incurred pursuant to this paragraph (b) shall be allowable costs under this contract. Except as otherwise directed by the Contracting Officer, in writing, the University shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the University with respect to such action or claim. To

* Modified for this contract.

the extent not in conflict with any applicable policy of insurance, the University may, with the Contracting Officer's approval, settle any such action or claim.

(2) Upon the Government's written acceptance and assurance of full responsibility for all University litigation or claim costs and expenses, including judgments, for such an action or claim, the University shall (i) effect, at the Contracting Officer's request, an assignment and subrogation in favor of the Government of all of the University's rights and claims (except those against the Government) arising out of such action or claim against the University and (ii) if requested by the Contracting Officer, shall authorize representatives of the Government to settle or defend such action or claim and to represent the University in, or take charge of such action; provided, however, the University has the right to decline any such Contracting Officer request under (i) or (ii) above and may proceed with the litigation under its sole direction in any action in which The Regents determine that a substantial institutional interest of the University is involved or in which equitable relief against the University is sought if the University assumes full responsibility for the litigation costs, including judgments.

(3) If the settlement or defense of any action or claim against the University is undertaken by the Government, the University (i) may, at its option, participate therein as an allowable cost without affecting its rights under this clause and (ii) shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action or claim against the University is not covered by a policy of insurance, the University shall, with the approval of the Contracting Office, proceed with the defense of the action in good faith and in such event the defense of the action or claim shall be at the expense of the Government; provided, however, that the Government shall not be liable for such expense to the extent that it would have been compensated for by insurance which was required by law or by the written direction of the Contracting Officer, but which the University failed to secure or maintain through its own fault or negligence.

(c) Litigation and claims commenced by the United States against the University, or commenced by a State for violation of federal or state statute or regulation. The University shall give the Contracting Officer immediate notice in writing of any action, including any proceeding before an administrative agency, commenced against the University by the United States, or commenced by a State for violation of or failure to comply with a federal or state statute or regulation, arising from, or relating to, the University's performance of this contract. Except as precluded by (1) Article VII, Clause 1 (e)(16) and (33), (2) the Major Fraud Act (41 U.S.C. § 256) when a State or the United States is a party, and (3) the Equal Access to Justice Act (28 U.S.C. § 2412 and 5 U.S.C. § 504) when the United States is a party, the costs and expenses of litigation and claims, including judgments, incurred pursuant to this paragraph (c) shall be allowable costs under this contract. The University shall proceed with its defense against such action or claim and shall provide copies of all pleadings to the Contracting Officer. The University may, with the Contracting Officer's approval, settle any such action or claim.

(d) Defense and Indemnification of Employees.

(1) The parties recognize that, under California law, the University could be required to defend and indemnify its officers and employees from and against civil actions and other claims which arise out of the performance of work under this contract. Except for defense costs made unallowable by (i) Article VII, Clause 1 (e)(16) or (ii) the Major Fraud Act (41 U.S.C. § 256), the costs and expenses, including judgments, resulting from the defense and indemnification of employees from and against such civil actions and claims shall be allowable costs under this contract if incurred pursuant to the terms of this paragraph (d). Costs and expenses, including judgments, resulting from the defense and indemnification of employees from civil fraud actions filed in federal court by the United States government will be unallowable where the employee pleads nolo contendere or the action results in a judgment or a conviction.

(2) The University shall immediately furnish the Contracting Officer written notice of any such claim or civil action filed against any employee of the University arising out of the work under this contract together with copies of all pleadings filed. The University shall also furnish a written determination by an appropriate official to the University that (i) the defense or indemnity of the employee is required by the provisions of the California Government Code, (ii) the employee was acting in the scope of his employment at the time of the actions which gave rise to the civil action or indemnity, and (iii) the exclusion set forth under California law for fraud, corruption, or malice on the part of the employee does not apply. A copy of any reservation of rights letter which the University may assert under California law with respect to the defense or indemnity of such employee shall also be provided to the Contracting Officer. The costs associated with the settlement of any such civil action or claims, shall not be treated as an allowable cost under this contract without the prior written approval of the Contracting Officer.

(e) Costs and Expenses of Litigation. "Costs and expenses of litigation and claims" as used herein include, but are not limited to, administrative and clerical expenses; the cost of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; all elements of compensation, related costs, and expenses of employees, officers, and directors; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceeding which bear a direct and substantial relationship to the proceedings.

ARTICLE XVII, CL. 2 - NUCLEAR HAZARDS INDEMNITY AGREEMENT (NOV 1991) - DEAR 952.250-70

(a) Authority. This clause is incorporated into this contract pursuant to the authority contained in subsection 170(d) of the Atomic Energy Act of 1954, as amended (hereinafter called the Act.)

(b) Definitions. The definitions set out in the Act shall apply to this clause.

(c) Financial protection. Except as hereafter permitted or required in writing by DOE, the University will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability, as described in paragraph (d)(2) below. DOE, however, may at any time require in writing that the University provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover public liability, provided that the cost of such financial protection will be reimbursed to the University by DOE.

(d)(1) Indemnification. To the extent that the University and other persons indemnified are not compensated by any financial protection, permitted or required by DOE, DOE will indemnify the University and other persons indemnified against (i) claims for public liability as described in subparagraph (d)(2) of this clause; and (ii) such legal costs of the University and other persons indemnified as are approved by DOE, provided that DOE's liability, including such legal costs, shall not exceed the amount set forth in section 170e(1)(B) of the Act in the aggregate for each nuclear incident or precautionary evacuation occurring within the United States or $100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in paragraph (d)(1) of this clause is public liability which (i) arises out of or in connection with the

activities under this contract, including transportation; and (ii) arises out of or results from a nuclear incident or precautionary evacuation, as those terms are defined in the Act.

(e)(1) Waiver of Defenses. In the event of a nuclear incident, as defined in the Act, arising out of nuclear waste activities, as defined in the Act, the University, on behalf of itself and other persons indemnified, agrees to waive any issue or defense as to charitable or governmental immunity.

(2) In the event of an extraordinary nuclear occurrence which:

(i) Arises out of, results from, or occurs in the course of the construction, possession, or operation of a production or utilization facility, or

(ii) Arises out of or results from or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility, or

(iii) Arises out of or results from the possession, operation, or use by the University or a subcontractor of a device utilizing special nuclear material or by-product material, during the course of the contract activity; or

(iv) Arises out of, results from, or occurs in the course of nuclear waste activities, the University, on behalf of itself and other persons indemnified, agrees to waive:

(A) Any issue or defense as to the conduct of the claimant (including the conduct of persons through whom the claimant derives its cause of action) or fault of persons indemnified, including, but not limited to:

1 Negligence;

2 Contributory negligence;

3 Assumption of the risk; or-

4 Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God.

(B) Any issue or defense as to charitable or governmental immunity; and

(C) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or change and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

(v) The term extraordinary nuclear occurrence means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in 10 CFR Part 840.

(vi) For the purposes of that determination "off-site" as that term is used in 10 CFR part 840 means away from "the contract location" which phrase means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any University-owned or controlled facility, installation, or site at which the University is engaged in the performance of contractual activity under this contract.

(3) The waivers set forth above:

(i) Shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action;

(ii) Shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified;

(iii) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;

(iv) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;

(v) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefor are either payable or required to be provided under any workers' compensation or occupational disease law;

(vi) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;

(vii) Shall be effective only with respect to those obligations set forth in this agreement and in insurance policies, contracts or other proof of financial protection; and

(viii) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (A) the limit of liability provisions under subsection 170e of the Act of 1954, as amended, and (B) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) Notification and litigation of claims. The University shall give immediate written notice to DOE of any known action or claim filed or made against the University or other person indemnified for public liability as defined in paragraph (d)(2). Except as otherwise directed by DOE, the University shall furnish promptly to DOE, copies of all pertinent papers received by the University or filed with respect to such actions or claims. DOE shall have the right to,

and may collaborate with the University and any other person indemnified in the settlement or defense of any action or claim and shall have the right (1) to require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder, and (2) to appear through the Attorney General on behalf of the University or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the University or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) Continuity of DOE obligations. The obligations of DOE under this clause shall not be affected by any failure on the part of the University to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the University, or by the completion, termination or expiration of this contract.

(h) Effect of other clauses. The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of this contract, including Article XVI, Clause 3, "Disputes," provided, however, that this clause shall be subject to the clauses entitled Covenant Against Contingent Fees, Officials Not to Benefit, and Examination of Records by Comptroller General, and any provisions later added to this contract as required by applicable Federal law, including statutes, executive orders and regulations, to be included in Nuclear Hazards Indemnity Agreements.

(i) Civil penalties. Reserved

(j) Criminal penalties. Any individual director, officer, or employee of the University or of its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to criminal penalties, pursuant to 223(c) of the Act, for knowing and willful violation of the Atomic Energy Act of 1954, as amended,

and applicable DOE nuclear safety-related rules, regulations or orders which violation results in, or, if undetected, would have resulted in a nuclear incident.

(k) Inclusions in subcontracts. The University shall insert this clause in any subcontract which may involve the risk of public liability, as that term is defined in the Act and further described in paragraph (d)(2) above. However, this clause shall not be included in subcontracts in which the subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for the activities under this subcontract.

ARTICLE XVII, CL. 4 - GENERAL INDEMNITY (SPECIAL)

(a) DOE deems the performance of the work hereunder by the University to be essential in the interest of the common defense and security of the United States. DOE and the University recognize that, in part, this work involves unusual, unpredictable and abnormal risks.

(b) In view of these circumstances, it is agreed that all work under this contract is to be performed at the expense of the Government and that the University shall not be liable for and the Government shall indemnify and hold the University harmless against any delay, failure, loss or damages, judgment or liability (including personal injuries and deaths of persons and damage to property) and any expenses in connection therewith (including costs of damages, costs and expense of litigation and claims) arising out of or connected with the work, including any loss or damage and incidental expense for any alleged liability for patent infringement or any alleged liability of any kind, and for any cause whatsoever arising out of or connected with the work. It is understood that the Government is obligated under this paragraph (b), whether or not any employee of the University is responsible therefor, unless any such delay, failure, loss, expense or damage (1) should be determined to have been caused directly by bad faith or willful misconduct on the part of some Corporate Officer or Officers of the University of California or of any person acting as Laboratory Director, (2) would ultimately be an unallowable cost under the provisions of this contract or (3) results from a contractual commitment which when incurred exceed the funds then obligated to the contract.

(c) The Government shall pay directly and discharge completely all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees, entered against the University and when requested by the University, all claims which may be settled by agreement and approved by the Contracting Officer.

(d) The obligations of DOE under this clause, Article XVII, Clause 1, "Litigation and Claims," and Article X, Clause 6, "Special Hazards," shall survive completion or termination of this agreement and shall be subject to the availability of funds appropriated from time to time by Congress. To the extent that funds are not available for payment under this clause, Article XVII, Clause 1, "Litigation and Claims," and Article X, Clause 6, "Special Hazards," DOE will use its best effort to obtain such funds.

(e) In the event that circumstances arise in the course of the work under this contract which could expose the University to financial liability arising from unusually hazardous or nuclear risks for which adequate protection is not provided under the terms of this contract, DOE agrees to consider in good faith a request from the University for indemnification against such risks under Public Law 85-804, in accordance with the procedures prescribed in Subpart 50.4 of the FAR and the no gain/no loss principle set forth in Article VI, Clause 2, of this contract.

Modification No. M205
Supplemental Agreement to
Contract No. W-7405-ENG-48

IN WITNESS HEREOF The parties hereto have executed this Supplemental Agreement as of the day and year first above written.

THE UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY

DATE: 11-20-92 BY: s/Donald W. Pearman, Jr.
Donald W. Pearman, Jr., Manager
San Francisco Field Office
Contracting Officer

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

DATE: 11-20-92 BY: s/Meredith J. Khachigian
Meredith J. Khachigian, Chairman

DATE: 11-20-92 BY: s/Bonnie M. Smotony
Bonnie M. Smotony, Secretary

DATE: 11-20-92 BY: s/Clair W. Burgener
Clair W. Burgener, Chairman
Committee on Oversight of the
Department of Energy Laboratories

APPROVED AS TO FORM: BY: s/Allen B. Wagner
Allen B. Wagner,
University Counsel of The Regents
of the University of California

DEPARTMENT OF ENERGY
San Francisco Operations Office
1301 Clay Street
Oakland, California 94612-5208

Nov 23 1993

Dr. B[] G[]
[street address]
New York, New York [zipcode]

Dear Dr. G[]:

This is in response to your telephone conversation with me earlier this month concerning the Lawrence Livermore National Laboratory's (LLNL's) withdrawal of its offer of employment to you in June 1991. Based upon a review of the correspondence in this matter, there appear to be two major issues in this controversy.

The first of these issues concerns the reasons given by various Laboratory employees at different times for the withdrawal of the offer of employment. In retrospect, it appears that the Laboratory was not entirely candid with you in initially defending its decisions as based on security concerns and concluding that you were not a viable candidate for a security clearance. In his letter of September 25, 1992, the Manager of the San Francisco Field Office concluded that the Laboratory process for documenting its decision and conveying that information to you was unsatisfactory. As you know, that letter went on to clearly state the Department's policy that employment decisions cannot be made on the basis of security clearance determinations which are solely within the province of DOE, while recognizing that the Laboratory was solely responsible for determining that an applicant is qualified and suitable to perform the duties of that position.

The SF Manager also requested that the Laboratory review your case and determine if there were additional actions LLNL should take. As you know the Laboratory subsequently reaffirmed its

decision not to hire you, apparently on grounds other than its conclusion as to whether you were a viable candidate for a security clearance. Based upon your conversation with me and other SF personnel, you view the different statements by various Laboratory employees at different times as inconsistent and intellectually dishonest. You also believe that the SF review of this matter, in your words, was "fraudulent."

The second major issue in your case is whether your accepted the Laboratory's offer before it was withdrawn, thereby creating a valid contract. I am informed that this is a purely technical legal issue.

Our records reflect that you filed a complaint with the Office of the Inspector General for the Department in October 1991, and that Congressman Bill Green wrote to the Department on your behalf in the same month. You subsequently initiated litigation against the Department, the University of California and LLNL Director John Nuckolls based on the Laboratory's decision not to hire you. Depositions of the SF Manager and LLNL employees involved in this matter were taken. Thereafter, the Complaint was amended to eliminate the Department as a defendant. The U.S. District Court in San Francisco later granted the University's Motion to Dismiss UC, and John Nuckolls, in his official capacity, as defendants based on the 11th Amendment of the United States Constitution. I understand that your action against Director Nuckolls, in his personal capacity, continues in federal court, and that you have filed an appeal with the 9th Circuit U.S. Court of Appeals.

The substance of your complaint, and action you request, is that the Department should do the right thing and direct the Laboratory to hire you. This would also permit the Department to determine your eligibility for a security clearance. I believe that the Department has done everything it can legally do under the circumstances of your case, and I cannot take the action you have requested.

The Lawrence Livermore National Laboratory (LLNL) is a Government-owned facility which is primarily funded by the Department of Energy. The University of California manages and

operates LLNL for the Department, and the rights and obligations of the University and the Department are defined by Contract Number W-7405-ENG-48. Under the contract, the Department does not have the right to substitute its judgment as to your qualifications and suitability for employment for that of the Laboratory and direct that you be hired by the Laboratory. (This is generally the case under all Government contracts.)

Likewise, under the contract in existence at the time you filed your lawsuit, the Department did not have the contractual right to approve or direct the University and the Laboratory's defense against your action, and cannot direct that it be settled. However, absent clear and convincing evidence of bad faith or willful misconduct of the Laboratory Director, the Department will bear the cost of defending the University and the Laboratory, and of any monetary judgment in your favor which may be rendered by the courts. Therefore, we believe that we must await the outcome of your litigation and that it would be inappropriate to further comment on the merits of your case.

Moreover, allegations of fraud, waste and abuse are within the exclusive jurisdiction of the Department's Office of Inspector General. In this respect, I understand that the OIG continues to be interested in your case.

Finally, I am also aware that, since the withdrawal of LLNL's offer of employment in June 1991, you have sought to resolve your grievance informally at the highest levels of the Department, the executive and legislative branches of the federal government, the University of California and the state government. I can also understand your frustration that two years of conscientious and persistent effort on your part has not been able to resolve the issues. I also know that our position in this matter is unacceptable to you. However, I believe that the Department has done everything it can

legally do under the contract with the University of California, and that we must await the outcome of your litigation.

Sincerely,

[Signature]

Martin J. Domagala
Acting Deputy Manager